IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4916 of 2005
With
SPECIAL CIVIL APPLICATION No. 4940 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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AKSHAR IMAGE THRO'PROPRIETOR KARUNABEN - Petitioners
Versus
JAHESH CREATION & 3 - Respondents

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Appearance :
MR KG VAKHARIA, SENIOR ADVOCATE WITH MR MK VAKHARIA for Petitioners.

MR SI NANAVATI, SENIOR ADVOCATE FOR NANAVATI & NANAVATI for Respondents.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 10/01/2007

COMMON ORAL JUDGMENT

1. Since common issue is involved in both these petitions and since they are heard together, the same are being disposed of by this common judgment and order.

2. Special Civil Application No. 4916 of 2005 is filed by M/s. Akshar Image, the petitioner – orig. plaintiff under Article 227 of the Constitution of India challenging the order dated 20.01.2005 passed by the learned City Civil Judge, Ahmedabad below an application Exh.102 in Civil Suit No. 82 of 2002 whereby the application filed by the present respondent No. 1 – orig. defendant No. 1 praying for amending the written statement and seeking direction to treat the amended written statement as counter claim, was allowed.

3. Similarly, Special Civil Application No. 4940 of 2005 is filed by M/s. Akshar Print challenging the order dated 20.01.2005 passed by the learned City Civil Judge, Ahmedabad below an application Exh. 94 in Civil Suit No. 83 of 2002 whereby the application filed by the present respondent No. 1 – orig. defendant No. 1 praying for amending the written statement and seeking direction to treat the amended written statement as counter claim, was allowed.

4. For the sake of convenience, the facts are taken from Special Civil Application No. 4916 of 2005.

5. The petitioner in Special Civil Application No. 4916 of 2005 is a proprietary concern engaged in the business of designing, processing, printing etc. The petitioner has been doing the work of processing and printing for the respondents since 1999. The petitioner used to supply books duly processed and printed by it to the respondents as per the order. The petitioner used to supply the said books and

other printed materials to the respondents at their office situated in Ahmedabad through which the said books and other materials were dispatched to the office at America. As the respondents were the clients of the petitioner since 1999, and as they were regular initially in making payment, the petitioner started giving credit to the respondents. However, since somewhere around 2001, the respondents started making payment irregularly. Thus, an outstanding amount of about Rs. 5 Lacs remained due from the respondents as on the date of filing of the suit in 2002. As the respondents did not make payment of the printed materials purchased by it to the petitioner regularly and as huge amount remained outstanding, the petitioner was constrained to file Summary Suit No. 82 of 2002 for recovery of an amount of Rs.6,28,753.99 ps. before the City Civil Court, Ahmedabad. Similarly, the petitioner in Special Civil Application No. 4940 of 2005 has also filed Summary Suit No. 83 of 2002 for recovery of an amount of Rs.5,33,198.78 ps. before the City Civil Court, Ahmedabad.

6. The petitioners further state and submit that in the aforesaid two suits, summons were issued and duly served upon the respondents and original defendants have appeared before the Court and filed their leave to defend affidavit in summons for judgment. The petitioners have also filed rejoinder to the affidavit to their leave to defend affidavits. After going through the summons for judgment, leave to defend affidavit as well as rejoinder affidavit, the learned City Civil Judge, Ahmedabad has granted unconditional leave to defend the suit to the respondents in both the suits.

7. Feeling aggrieved and dissatisfied by the order passed by the learned City Civil Judge, Ahmedabad granting unconditional leave to defend the respective Summary Suits, the petitioners have filed Special Civil Application No. 9761 & 9762 of 2003 before this Court. Both these petitions came to be disposed of by this Court vide order dated 11.07.2003 directing the City Civil Court to dispose

of the suits as early as possible and preferably within a period of six months. Since the said suits could not be disposed of within the time limit stipulated by this Court, a note for extension of the said period was moved upon which an order came to be passed by extending the time upto August, 2004.

8. The respondents – original defendants have thereafter moved an application in their respective suits praying to amend the written statement and to consider the same as counter claim under Order VI, Rule 17 and Order VIII, Rule 6 A & B and Section 151 of C.P.C. The said application was filed and numbered as Exh. 102 & 94 respectively in each of these two suits. The petitioners have filed their reply to the said applications for amending the written statement and thereby opposed the said applications on the ground of limitation as well as on the ground that granting of such applications at that stage would change the nature of the suits. In the said applications, the respondents – original defendants have sought to claim Rs.6,92,650/- and

Rs.6,08,340/- respectively from the petitioners on the ground that the petitioners have made entries in the books of accounts even for those materials which have been as per the say of the respondents rejected by them and also on the ground of excessive price of the materials as the same have never been complained of by them in the past while placing orders with the petitioners.

9. The learned City Civil Judge, Ahmedabad after hearing the parties passed an order allowing the said applications of the respondents – original defendants vide order dated 20.01.2005 in each of these two suits.

10. Feeling aggrieved by the said order, the petitioners have approached this Court invoking the writ jurisdiction of this Court under Article 227 of the Constitution of India.

11. Both these petitions were admitted on 28.04.2005 and stay granted by the learned City Civil Judge,

Ahmedabad was ordered to be continued till the final disposal of the main Special Civil Application, by virtue of an order passed by this Court in Civil Application No. 5181 & 5182 of 2006 respectively.

12. Mr. K.G. Vakharia, learned Senior Counsel appearing with Mr. Mehul Vakharia for the petitioners in both these petitions has submitted that the learned City Civil Judge has committed a grave error by not considering the fact that the suits have been filed in the year 2002 and even the issues have already been framed by him. Once the issues have been framed, then the scope of amending the written statement by the defendant is very limited. The suits are filed for recovery of the amounts due and outstanding which is in the nature of summary suits and as per the settled legal position, in a summary suit when at the time of filing leave to defend affidavit, the defendant does not raise any issue regarding counter claim then the same would not be entertainable at a belated stage as the proper remedy would be to file a cross suit before the

competent Court. He has further submitted that after framing of the issues in the aforesaid suits, even the examination of the petitioner i.e. original plaintiff has already been started and the said suit is at the stage of evidence. Even the respondents have also started cross-examination of the petitioner on the basis of original claim and in the midst of cross-examination, the said application for amendment / counter claim has been filed with a clear intention of delaying the adjudication of the suits. When the original suit has reached at the stage of evidence on the basis of the original amount claimed by the petitioner – original plaintiff, the subsequent application preferred after a lapse of almost two years should not have been entertained for raising counter claim of the more amount than the original amount mentioned in the suit as the same would change the character and nature of the suits.

13. Mr. Vakharia has further submitted that this Court in Special Civil Application No. 9761 & 9762 of 2003 vide its order dated 11.07.2003 directed to dispose

of both the suits as early as possible and preferably within a period of six months from the date of receipt of writ of the said order. The said time limit was thereafter extended upto August 2004 on the note preferred for extension of time limit. The respondents – original defendants have moved an application for amending the written statement filed in the year 2002 sometimes in the month of June 2004 only with a view to see that the adjudication of the suits is prolonged. The learned City Civil Judge should not have entertained such applications at the belated stage.

14. Mr. Vakharia has further submitted that the respondents – original defendants have never raised any objection regarding the price or the quality of the materials supplied by the petitioners and they also never intimated the petitioners about rejection of any materials. For the first time by moving applications for amendment and for raising the counter claim, such dispute was raised by the respondents. It cannot, therefore, be considered to

be genuine or bonafide claim. He has further submitted that once the cross-examination of the petitioner has already been started on the basis of the claim made by the petitioners, the impugned orders granting amendment of the written statement and treating the same as counter claim of the respondents would make it necessary to lead the evidence afresh and to examine the petitioner on the basis of new evidences. Such a course is not open for the respondents and hence, the learned City Civil Judge should not have passed the impugned orders.

15. Mr. Vakharia has further submitted that the respondents have filed their written statement somewhere in the year 2002 and the applications below which the impugned orders have been passed were moved only in the year 2004 i.e. after a lapse of about two years which would make it clear that the amendment applications filed by the respondents are nothing but an afterthought and were filed only for the purpose of delaying the proceedings. The respondents have remained silent for a very long

time and at the fag end of the proceedings and that too after this Court directed the trial Court to dispose of the suit within a stipulated period, the applications came to be filed in order to frustrate the hearing of the suits.

16. Mr. Vakharia has further submitted that after the amendment made in the Civil Procedure Code by virtue of the Code of Civil Procedure (Amendment Act) 2002, a proviso was added to Rule 17 of Order VI which says that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such a manner and on such terms as may be just and all such amendment shall be made as can be necessary for the purpose of determining the real questions in controversy between the parties, provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised matter before the commencement of trial. He has, therefore, submitted that by virtue of this proviso

and since the trial has already commended and no due diligence has been shown by the respondents, the learned City Civil Judge should not have entertained the amendment in question.

17. Mr. Vakharia has further submitted that the respondents – original defendants have already filed their leave to defend affidavit in summons for judgment and they have also filed pursis to the effect that their leave to defend affidavit may be treated as their written statements. In view of the provisions contained in Rule 6-A of Order VIII of CPC, it is not open for the respondents – orig. defendants to make counter claim by seeking amendment in their written statement. Rule 6-A states that a defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after filing of the suit but before the defendant has delivered his defence or before the time limited for

delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not. Since the respondents have already delivered their defence and since no time was granted by the Court, the applications preferred by them for amendment in the written statement is not permissible. He has, therefore, submitted that the impugned orders passed by the learned City Civil Judge are contrary to the facts and evidence on record as well as in violation of the statutory provisions and are required to be quashed and set aside.

18. Mr. S. I. Nanavati, learned Senior Counsel appearing for Nanavati and Nanavati for the respondents, on the other hand, has supported the orders passed by the learned City Civil Judge. He has submitted that both these petitions are filed under Article 227 of the Constitution of India. The jurisdiction of the Court under Article 227 of the Constitution of India is very limited and it can be exercised only when the Court below has acted in

excess of or without jurisdiction or the order passed is in violation of the principles of natural justice or it is contrary to the constitutional provisions. None of these circumstances found which empowers this Court to interfere in the order passed by the learned City Civil Judge, Ahmedabad. In support of his submission, he relied on the decision of this Court in the case of Ajendraprasadji Narendraprasadji Pande in Special Civil Application No. 1380 of 2006 decided on 09.03.2006.

19. Mr. Nanavati has further submitted that proviso to Order VI Rule 17 is two-fold. For applicability of this proviso, first of all, it is to be seen as to whether the trial has commenced and even after commencement of the trial, the Court has to come to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial. The phrase 'commencement of trial' has come up for consideration before the Hon'ble Supreme Court in the case of **Baldev Singh and Others V/s.**

Manohar Singh and Another, 2006 (6) SCC 498 wherein it is held that commencement of trial as used in proviso to Order 6, Rule 17 in Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. Since the stage of final hearing of the suit has not yet come, there is no reason to reject the application for amendment of the written statement in view of proviso to Order VI, Rule 17 as interpreted by the Hon'ble Supreme Court, which confers wide power and unfettered discretion to the Court to allow amendment of the written statement at any stage of the proceedings.

20. Mr. Nanavati has further relied on the decision of the Madras High Court in the case of **L. Narayan Reddy V/s. P. Narayan Reddy and others, AIR 2005 MADRAS 66** wherein it is held that the proviso cannot be an impediment or bar in allowing the amendment application if it otherwise deserves

on merit to be allowed on the basis that trial has been commenced and, therefore, no amendment shall be allowed after commencement of the trial. In the case before the Madras High Court, pleadings were filed prior to amendment of Act. The Court observed that some of the provisions omitted in Order 6, some of the provisions inserted or substituted by Amended Civil Procedure Code shall not apply to in respect of any pleading filed before the commencement or implementing the amended provisions. Here in the present case, the suit was filed in the year 2002 i.e. before the amendment introduced under Act 22 of 2002 and in this view of the matter, it was contended that the proviso cannot be an impediment or bar in allowing the amendment application.

21. Mr. Nanavati has further submitted that the amendment in written statement granted by the learned City Civil Judge, Ahmedabad is not contrary to the provisions contained in the law of limitation. For this purpose, he has invited the Court's attention

to the documentary evidence produced before the trial Court and submitted that the counter claim made by the respondents – original defendants is well within the period of limitation.

22. Considering all the aforesaid submissions, Mr. Nanavati has strongly urged that the impugned orders allowing the applications for amendment in the written statement and treating the same as counter claim are rightly passed and no interference is called for while exercising this Court's power under Article 227 of the Constitution of India. Hence, the petitions be dismissed with cost.

23. After having heard learned Senior Advocate Mr. K.G. Vakharia appearing for the petitioners and learned Senior Advocate Mr. S.I. Nanavati appearing for the respondents in both these petitions and after having gone through the impugned orders of the learned City Civil Judge, Ahmedabad and after having considered the relevant statutory provisions contained in the Code of Civil Procedure and the

authorities referred to by the learned City Civil Judge as well as cited before this Court, it appears to this Court that the learned City Civil Judge, Ahmedabad has committed a very serious error of law and facts while allowing the applications to amend the written statement and treating the same as counter claim of the respondents – orig. defendants. The authorities which have been referred to by the learned City Civil Judge, Ahmedabad are all prior to the amendment in Order-VI, Rule17 of the Code of Civil Procedure. The proviso which was inserted to Rule 17 by virtue of the Code of Civil Procedure (Amendment Act) 2002 which has come into force w.e.f. 01.07.2002, was not under consideration before the Court while the judgments referred to and relied upon by the learned City Civil Judge, Ahmedabad were delivered. The undisputed facts which were enumerated by the learned City Civil Judge in his order are that the respondent No. 1 in response to the summons for judgment taken out by the petitioner – original plaintiff, had filed an affidavit for leave to defend

wherein he has raised number of contentions including the jurisdiction, want of brevity of contract, misjoinder and nonjoinder of necessary parties, interest and advance payments and has also contended in paragraph 13 that as per the accounts maintained by the defendant No.1, he has to recover Rs.6,08,340/- from the plaintiff in Civil Suit No. 83 of 2002 and Rs.6,96,250/- in case of Civil Suit No. 82 of 2002. It has also been stated in clear terms that the respondent No. 1 – original Defendant No. 1 was going to file counter claim to recover the said amount. Even in paragraph 14 of the leave to defend affidavit, a contention was raised with regard to rejection of some goods due to inferior quality. Based on these rival contentions, unconditional leave to defend the suit was granted. The learned City Civil Judge has also referred to the fact that in view of an application Exh. 36, the learned advocate for the defendant No. 1 has adopted application for leave to defend as written statement and necessary issues have been framed and recording of evidence of plaintiff has been started in the Court. If these

facts are not disputed, then straightway the proviso to Order VI, Rule 17 has come into effect. As observed earlier, the proviso specifically states that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial. What is meant by commencement of trial has also been explained by the Hon'ble Supreme Court in the case of Baldev Singh and Others V/s. Manohar Singh and Another (Supra) wherein it is specifically stated that commencement of trial as used in proviso to Order 6, Rule 17 in Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. In the present case, as observed by the learned City Civil Judge, the examination of witnesses has already been started and documents have also been filed. The learned Trial Judge is, therefore, not right in allowing the amendment application after the trial

has commenced.

24. It is also pertinent to note that by allowing the respondent No. 1 – original defendant No. 1 to amend the written statement and to treat the same as counter claim, the entire complexion of the suit has been changed and it has caused prejudice to the petitioner – original plaintiff. Even Order VIII, Rule 6-A of the Code of Civil Procedure also prohibits the respondent No. 1 – original defendant No. 1 to amend the written statement as the defence has already been delivered by the respondent No. 1 – orig. defendant No. 1 by adopting leave to defend affidavit as the written statement. The Court has not thereafter granted any further time to the respondent No. 1 – original defendant No. 1 to file the written statement. It is true that respondent No.1 – orig. defendant No. 1 has made certain averments in the leave to defend affidavit with regard to the disputes about inferior quality of goods and also to raise counter claim. However, those observations are good enough for the purpose of

getting unconditional leave from the Court. The respondent No. 1 has thereafter remained silent for about 2 years and only after the directions issued by this Court while disposing of Special Civil Application No. 9761 & 9762 of 2003 and after the issues were framed and the evidence was started, the respondent No. 1 has come forward with the application for amendment in the written statement. This shows the intention on the part of respondent No. 1 – orig. defendant No. 1 to delay the proceedings. The Court cannot allow the parties to raise such disputes at a belated stage and that too when the intention is not genuine or bonafide. Considering all these facts together, the Court is of the view that the learned City Civil Judge has exceeded his jurisdiction in entertaining the amendment applications and when there is a question of exercise of jurisdiction in excess of what was vested in the subordinate Court, this Court can certainly interfere while entertaining the petition under Article 227 of the Constitution of India. The judgment of this Court delivered in Special Civil

Application No. 1380 of 2006 would not render any assistance to the respondents – orig. defendants.

25. In the above view of the matter, the impugned orders passed by the learned City Civil Judge, Ahmedabad are hereby quashed and set aside and both these petitions are allowed. Rule is made absolute in each of these two petitions without any order as to costs.

[K. A. PUJ, J.]

Savariya